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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, AND DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,
Petitioners,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF IN OPPOSITION OF RESPONDENT NIAGARA MOHAWK POWER CORPORATION

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QUESTION PRESENTED

Whether the New York State Court of Appeals correctly decided that section 401 of the Clean Water Act (33 U.S.C. § 1341) does not empower the New York State Department of Environmental Conservation to condition the issuance of a license under Part I of the Federal Power Act or the performance of dam maintenance and repair work mandated by the Federal Energy Regulatory Commission on compliance with various state laws that are not water quality standards promulgated by the state and approved by the United States Environmental Protection Agency pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313).

STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Sup. Ct. R. 29.1, Respondent Niagara Mohawk Power Corporation states that it does not have any parent companies or subsidiaries, except wholly owned subsidiaries. Niagara Mohawk Power Corporation's wholly owned subsidiaries are:

NM Uranium, Inc.
HYDRA-CO Enterprises, Inc.
Opinac Energy Corporation
NM Suburban Gas Inc.

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BRIEF IN OPPOSITION OF RESPONDENT NIAGARA MOHAWK POWER CORPORATION

STATEMENT

A. Introduction

Niagara Mohawk Power Corporation ("Niagara Mohawk") is a public utility that provides electric service to more than 1.5 million customers living or working within a 24,000 square mile area in the State of New York. Niagara Mohawk derives approximately 10 percent of its requirements of electric capacity and energy from 73 hydroelectric facilities. These hydroelectric facilities provide over 700 megawatts of capacity and constitute the lowest cost component of Niagara Mohawk's energy resource mix.

Niagara Mohawk is the owner and operator of more hydroelectric facilities subject to the licensing provisions of the Federal Power Act ("FPA"), 16 U.S.C. §§ 792-828c (1988), than any other licensee. Niagara Mohawk recently has filed applications for new licenses with the Federal Energy Regulatory Commission ("FERC") to replace nine licenses for 30 of Niagara Mohawk's hydroelectric developments that were issued by the FERC or its predecessor, the Federal Power Commission, and that expired on December 31, 1993. Niagara Mohawk has also sought initial licenses for other hydroelectric projects. In connection with these applications, Niagara Mohawk also applied to the New York State Department of Environmental Conservation ("NYSDEC") for certifications under section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341 (1988). In addition, Niagara Mohawk is regularly required by the FERC to undertake dam repair or reconstruction projects, some of which also require section 401 certifications.

This case involves the review by the New York courts of a declaratory ruling by NYSDEC concerning the scope of NYSDEC's authority to regulate Niagara Mohawk's projects under section 401. In that ruling (App. at 1a-8a), NYSDEC claimed that it may condition a section 401 certification (and potentially veto a federal license) on any requirement remotely related to water quality. Applying a long line of its own precedent, the New York Court of Appeals rejected NYSDEC's claim of virtually unlimited authority, finding that NYSDEC may only enforce section 401 within the confines of "water quality standards" promulgated by the state and approved by the United States Environmental Protection Agency ("EPA") pursuant to section 303 of the CWA, 33 U.S.C. § 1313 (1988). (Pet. App. at 3a-13a.)

NYSDEC now seeks to press its claim before this Court. It has failed, however, to provide any basis for this Court to grant a writ of certiorari in this case. Con-

trary to NYSDEC's arguments, there is no conflict requiring resolution between the decisions of the New York Court of Appeals and the controlling holding of the Washington Supreme Court in *State Dep't of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646 (Wash. 1993), *cert. granted*, 62 U.S.L.W. 3206 (U.S. Oct. 4, 1993) (No. 92-1911) (hereinafter "the *Tacoma* case"). Moreover, further review is not required because the New York Court of Appeals was correct on the merits, applying a well-reasoned reading of the relevant statutes and its own long-standing precedents.

B. Statutory Scheme

1. Regulation under the Clean Water Act

In the CWA, 33 U.S.C. §§ 1251-1387 (1988), Congress enacted a comprehensive program for the control and abatement of water pollution that "anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1054 (1992). This program entails two features relevant to this case. First, to supplement the effluent restrictions established by EPA,[1] section 303 authorizes states to establish "water quality standards," consisting of "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2). State water quality standards must be approved by EPA before they can take effect.[2]

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[1] The EPA must promulgate effluent restrictions for different categories of water pollution sources, including: effluent limitations restricting the discharge of pollutants under sections 301 and 302 of the CWA, 33 U.S.C. §§ 1311, 1312; standards of performance applicable to the discharge of pollutants from new sources of water pollution under section 306, 33 U.S.C. § 1316; and toxic and pretreatment effluent standards under section 307, 33 U.S.C. § 1317.

[2] 33 U.S.C. § 1313(c)(3). Under EPA's regulations to review proposed state water quality standards, the "water quality criteria" in the state's water quality standards must be "sufficient to protect

Second, under section 401, applicants for federal licenses or permits for activities that may result in discharges of pollutants into navigable waters, must provide "a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of [Sections 301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1). If the state denies certification, the federal agency may not issue the license or permit. *Id.* Section 401(d) requires states to condition certifications on any "effluent limitations and other limitations, and monitoring requirements" necessary for compliance with any applicable effluent restrictions promulgated by EPA and with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Such limitations and requirements become conditions on the federal license or permit. *Id.*

2. *Regulation under the Federal Power Act*

Virtually all of Niagara Mohawk's hydroelectric projects are subject to regulation under Part I of the FPA, which vests in the FERC comprehensive authority over the construction, operation, and maintenance of hydroelectric facilities located on the navigable waters of the United States. *See* 16 U.S.C. §§ 797(e), 817(1). In discharging this broad authority, the FERC is directed to condition any hydroelectric license to ensure that the project is "best adapted to a comprehensive plan . . . for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses." 16 U.S.C. § 803(a)(1). The FERC must give such nondevelopmental interests "equal consideration" in licensing deci-

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the designated uses." 40 C.F.R. § 131.6(c) (1993). "When [water quality] criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b) (1993). If a state does not enact water quality standards that meet EPA's requirements, EPA shall promulgate water quality standards for the state. 33 U.S.C. § 1313(c).

sions. 16 U.S.C. § 797(e). Section 10(j) of the FPA requires the FERC to solicit the recommendations of various state and federal agencies regarding the conditions to be included in a project's license. 16 U.S.C. § 803(j). The FERC, however, retains ultimate authority to determine if, and under what conditions, a license will be issued. *See California v. FERC*, 495 U.S. 490, 499 (1990).

C. Procedural History

On May 24, 1990, Niagara Mohawk petitioned NYSDEC for a declaratory ruling stating that NYSDEC was preempted by the FPA from applying the permit-based requirements of Title 5 of Article 15 of New York's Environmental Conservation Law ("ECL"), N.Y. Envtl. Conserv. Law §§ 15-0501 to -0515 (McKinney 1984 & Supp. 1994)—regarding dam safety, dam construction, and work in and around streams—to Niagara Mohawk's FERC-ordered dam reconstruction and dam safety-related work.[3] In a declaratory ruling,[4] NYSDEC claimed that, pursuant to section 401 of the CWA, it possesses the authority to apply to Niagara Mohawk's hydroelectric projects not only the permit-based requirements of Title 5 of Article 15 of the ECL, but also other provisions of the ECL that are only tangentially related to water quality.[5] NYSDEC did not claim that these pro-

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[3] This petition was filed pursuant to section 204(1) of the State Administrative Procedure Act, N.Y. A.P.A. § 204(1) (McKinney Supp. 1994), and N.Y. Comp. Codes R. & Reg. tit. 6, Part 619 (1989).

[4] Declaratory Ruling 15-09, *stated in* Letter from Marc S. Gerstman, Deputy Commissioner and General Counsel of NYSDEC, to Brian K. Billinson, Senior Counsel of Niagara Mohawk Power Corporation (Aug. 27, 1990). (App. at 1a-8a.)

[5] Specifically, NYSDEC listed (App. at 7a) the following other provisions of the ECL: Article 8 (the State Environmental Quality Review Act or "SEQRA"), N.Y. Envtl. Conserv. Law §§ 8-0101 to

visions were subsumed within the state's water quality standards; rather, NYSDEC claimed that *any* state law requirement would be a permissible basis for a condiiton to a section 401 certification as long as the requirement is "water-quality related." (App. at 8a.)

NYSDEC did not articulate any bounds to this alleged authority in its declaratory ruling. Indeed, by claiming authority to impose conditions based on SEQRA, NYSDEC expressly claimed unlimited authority to impose requirements related to environmental quality generally, even if they do not touch upon the water quality impact of a project.[6] NYSDEC's assertion of authority, if upheld, would have subjected Niagara Mohawk to a state environmental regulatory scheme that would duplicate and conflict with the licensing requirements of the FPA and would significantly delay and increase the cost of Niagara Mohawk's hypdroelectric licensing and dam maintenance/repair efforts.

Niagara Mohawk filed a petition for review of NYSDEC's ruling in the New York Supreme Court, Albany County, and on April 1, 1991, the court issued an

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-0117; Article 24 (Freshwater Wetlands Act), N.Y. Envtl. Conserv. Law at §§ 24-0101 to -1305; Article 11 (Fish and Wildlife Act), N.Y. Envtl. Conserv. Law at §§ 11-0101 to -2305; Article 15, Title 8 (Reservoir Releases), N.Y. Envtl. Conserv. Law at §§ 15-0801 to -0807; and Article 15, Title 27 (Wild, Scenic and Recreational Rivers Systems), N.Y. Envtl. Conserv. Law at §§ 15-2701 to -2723.

[6] *See* App. at 8a:

> Further, SEQRA has been interpreted as giving DEC the authority to impose conditions on State permits that are not substantively related to the permit being issued but which are "designed to mitigate the adverse environmental impacts identified, so long as these measures are reasonable in scope and reasonably related to the adverse impacts identified in the [environmental impact statement]." Thus, in conducting a SEQRA review of a 401 Certification request for a hydropower project, DEC may seek to impose additional conditions, *including* water-quality related conditions, on the certificate.

(Emphasis added; citation omitted.)

order and memorandum decision annulling NYSDEC's ruling. (Pet. App. at 25a-33a.) The court held that section 401 of the CWA authorized NYSDEC to apply to hydroelectric projects licensed by the FERC under the FPA only the water quality standards promulgated by NYSDEC under section 303 of the CWA,[7] not the other provisions of the ECL cited by NYSDEC in its declaratory ruling.[8] On January 7, 1993, the Appellate Division, Third Department, issued an Opinion and Order unanimously affirming the judgment of the New York Supreme Court. (Pet. App. at 14a-18a.)

On November 11, 1993, the New York Court of Appeals affirmed the Appellate Division's ruling and rejected NYSDEC's overly broad view of its authority as contrary to section 401. (Pet. App. at 1a-13a.) The Court of Appeals specifically held that, for purposes of issuing a section 401 certificate, NYSDEC was limited to considering the water quality standards set forth by the state and approved by the EPA under section 303. (*Id.* at 5a-6a.) The court held that NYSDEC's declaratory ruling was based on a fundamental misreading of section 401 that ignored explicit limitations on the scope of the certifying agency's authority. (*Id.* at 11a-12a.) The court also held that NYSDEC's position was contrary to its own long-standing interpretation of the authority to be exercised by New York state agencies under section

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[7] At the time Niagara Mohawk initiated the declaratory proceeding, NYSDEC's water quality standards were found at N.Y. Comp. Codes R. & Regs. tit. 6, §§ 701.19 and 704.2 (1985); they have been recodified in substantially the same form within N.Y. Comp. Codes R. & Regs. tit. 6, Parts 701-704 (1991-1993).

[8] The court also rejected NYSDEC's claim that the subject matter raised by Niagara Mohawk's petition was inappropriate for a declaratory order under the State Administrative Procedure Act. (Pet. App. at 28a-29a.) NYSDEC failed to seek review of this ruling in subsequent appeals in the New York courts.

401, and declined to follow decisions of other states, including the *Tacoma* case, cited by NYSDEC.[9]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE NEW YORK COURT OF APPEALS AND THE WASHINGTON SUPREME COURT.

NYSDEC's sole argument in support of its petition is that the decision below allegedly leads to a conflict between the decisions of the courts of last resort of the States of Washington and New York.[10] Based upon the facts and posture of the Washington Supreme Court's decision in the *Tacoma* case, 849 P.2d 646 (Wash. 1993), however, no meaningful conflict exists. The Court's exercise of its certiorari jurisdiction therefore is not warranted in this case.

The issue decided by the New York Court of Appeals was whether NYSDEC had authority to impose conditions on a section 401 certification based on state requirements that are, by NYSDEC's own admission, outside the scope of the state's water quality standards promulgated pursuant to section 303 of the CWA. In

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[9] The Court of Appeals relied upon precedent that has been applied in the New York courts for over 20 years. (*See* Pet. App. at 9a-10a (citing *de Rham v. Diamond*, 295 N.E.2d 673 (N.Y. 1973) and *Power Authority of State v. Williams*, 457 N.E.2d 726 (N.Y. 1983)).)

[10] NYSDEC thus evokes Sup. Ct. R. 10.1(b), which states that this Court may in its discretion grant a writ of certiorari "[w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." NYSDEC also asserts, without the support of argument or authority, that the New York Court of Appeals has wrongly decided "an important issue." (Pet. at 19.) However, offering no compelling explanation of why the question is "important" or why it was decided "wrongly" (other than reasserting arguments from below), NYSDEC gives no reason for this Court to exercise its discretion under Sup. Ct. R. 10.1(c).

contrast, the Washington Supreme Court in the *Tacoma* case dealt with an issue that is not presented here: whether conditions imposed by a state environmental agency on a section 401 certification were properly within the state's water quality standards pursuant to section 303. Specifically, in what NYSDEC describes as the Washington court's "primary holding" (Pet. at 6 n.3), the court in *Tacoma* upheld streamflow conditions imposed by a state agency on its certification of a hydropower project, even though the project owner claimed that such conditions would interfere with the FERC's streamflow setting functions under the FPA, because the state agency claimed that "the streamflow conditions in the 401 certificate issued to Tacoma *were necessary to assure compliance with Washington's water quality standards.*" *Tacoma*, 849 P.2d at 650 (emphasis added).

The primary issue addressed by the Washington court —i.e., whether a particular condition in a section 401 certification was necessary to comply with a section 303 water quality standard—was not presented by NYSDEC's declaratory ruling and, accordingly, was not addressed by the New York Court of Appeals. Unlike the state agency in the *Tacoma* case, NYSDEC conceded in the proceedings below and before this Court that the panoply of substantive state requirements that it seeks to impose in the section 401 certification process is *not* part of New York's section 303 water quality standards. (*See* App. at 4a & 7a-8a; Pet. at 16-17; Pet. App. at 12a.) The New York and Washington decisions thus address *different* statutory provisions and legal issues. While the Washington court addressed the proper scope of a state's water quality standards under section 303 of the CWA, the New York Court of Appeals addressed the proper scope of a state's authority under section 401 of the CWA.

In the *Tacoma* case, the Washington court made ancillary statements concerning the state agency's authority to condition section 401 certifications on "all state water

quality-related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303 of the Clean Water Act." *Tacoma*, 849 P.2d at 651. However, after the Washington court decided that the streamflow conditions imposed by the state agency were necessary to satisfy the state's water quality standards, the court's further statements about the state agency's broader authority were unnecessary to the court's decision to uphold the agency's actions. NYSDEC admits that the Washington court's statements about the state agency's authority to look beyond the state's water quality standards constitute, at most, an alterantive holding of the *Tacoma* case. (*See* Pet. at 6 n.3.) In fact, the ancillary statements of the Washington court are *dicta*, and the New York Court of Appeals properly refrained from giving them any weight.[11]

Accordingly, NYSDEC may not rely on the Washington court's ancillary statements to demonstrate that there is a conflict between the decisions of the New York and Washington courts.[12] The policies favoring uniformity in

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[11] It is not even clear that the Washington courts would follow these statements. *See Pedersen v. Klinkert*, 352 P.2d 1025, 1028 (Wash. 1960) ("Our statement . . . was not necessary to the decision in that case and was *dicta*."); *State v. Potter*, 842 P.2d 481, 489 n.7 (Wash. Ct. App. 1992) (finding that a certain statement was *dictum* because it "appears in the second of three alternative holdings to the case and is not one of the main holdings" and because "[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed."); *Plankel v. Plankel*, 841 P.2d 1309, 1310 (Wash. Ct. App. 1992) ("Initially, we observe that the second rationale of [the case] was not necessary to the decision and is thus non-binding *dicta*."). *See also Kastigar v. U.S.*, 406 U.S. 441, 454-55 (1972) ("The broad language in [the case] relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority.").

[12] As noted by NYSDEC (Pet. at 5), the *Tacoma* case is currently pending review in this Court in Case No. 92-1911. Niagara Mohawk participated in that proceeding as an *amicus curiae* out of concern that the Washington court's ill-advised *dicta* concerning a state

the interpretation of federal laws embodied in Sup. Ct. R. 10.1(b) are not present in this case, and NYSDEC has provided no basis for this Court to undertake the extensive task of reviewing the decision below.[13]

II. THE DECISION BELOW WAS WELL FOUNDED ON A LONG-STANDING INTERPRETATION BY NEW YORK'S HIGHEST COURT OF THE AUTHORITY THAT NEW YORK STATE AGENCIES MAY EXERCISE WITH RESPECT TO FEDERALLY LICENSED PROJECTS.

The Court of Appeals' reliance on time-honored New York precedent provides an additional reason for this Court to refrain from exercising its discretion to review the decision below. This is not a case in which the court below rested on a novel interpretation of section 401.

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agency's authority to look beyond water quality standards might be inappropriately extended. NYSDEC's petition demonstrates that Niagara Mohawk's concerns were well-founded. This case is not rendered worthy of review simply because Niagara Mohawk in its *amicus* brief refuted the Washington Court's *dicta* regarding the sole issue in this case.

[13] In its petition, NYSDEC does not identify any state court decisions other than the *Tacoma* case that allegedly conflict with the New York Court of Appeals' decision. NYSDEC cited to various other state decisions in the courts below to support its broad view of its authority (including, *inter alia*, *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. Ct. App. 1986); *Bangor Hydro-Elec. Co. v. Board of Envtl. Protection*, 595 A.2d 438 (Me. 1991); *Georgia-Pacific Corp. v. Department of Envtl. Conservation*, 528 A.2d 944 (Vt. 1992), *cert. dismissed*, 114 S. Ct. 671 (1994); *Hi-Line Sportsmen Club v. Milk River Irrigation Dists.*, 786 P.2d 13 (Mont. 1990); *Marmac Corp. v. Department of Natural Resources of West Virginia*, No. 81-1792, slip op. (W. Va. Cir. Ct. June 9, 1982); *Pennsylvania Dep't of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. Commw. Ct. 1990)). Because these cases involve decisions of lower state courts, rest on the same primary issue involved in the *Tacoma* case, or are consistent with the New York Court of Appeals' decision, these other state cases cannot be read to create a conflict with the decision below that must be resolved by this Court.

Rather, the court applied an interpretation that has defined the authority of administrative agencies in New York for over two decades. In 1973, the Court of Appeals, construing the predecessor of section 401, stated that:

> Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the [Federal] Power Commission has within its exclusive jurisdiction under the Federal Power Act.

de Rham v. Diamond, 295 N.E.2d at 768. This holding was echoed and reaffirmed, with respect to section 401, ten years later:

> In acting on an application for State section 401 certification of a hydroelectric project as a prerequisite to the issuance of a Federal license therefor, the Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met . . . .

Power Authority of State v. Williams, 457 N.E.2d at 727. As recognized by the Court of Appeals, accepting NYSDEC's position would constitute a "highly significant turnabout in law and policy" in New York. (Pet. App. at 10a.)

NYSDEC thus does not seek review of a single decision that implements a new restriction on its regulatory authority, but asks this Court "fundamentally to restructure a highly complex and long enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California*, 495 U.S. at 500. The federal courts have noted that states have primary responsibility for enforcing and interpreting section 401.[14] Regulated companies in New York,

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[14] *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 81 (1st Cir. 1993) ("Although state certification provisions are incorporated into federal permits, review of a state certification is a matter for local courts."); *Roosevelt Campobello Int'l. Park Comm. v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (noting that EPA has, since 1977, interpreted section 401 "broadly to preclude federal

such as Niagara Mohawk, have come to rely over the years on the state's interpretation of NYSDEC's limited authority and have structured their business accordingly, Moreover, NYSDEC has not shown that the Court of Appeals' consistent application of section 401 over the past 20 years has inhibited its efforts to protect water quality in New York.[15] The Court should decline to review and to disrupt the Court of Appeals' well-settled interpretation of the appropriate bounds of NYSDEC's authority under section 401.

III. THE NEW YORK COURT OF APPEALS CONSTRUED SECTION 401 PROPERLY.

A. The Language and Structure of Section 401 Support the Court of Appeals' Decision.

An additional reason why review is unwarranted in this case is that the New York Court of Appeals correctly interpreted section 401. The plain language of section 401 spells out the limits recognized by the Court of Appeals to NYSDEC's authority to impose conditions on section 401 certifications. Although NYSDEC is correct in noting (Pet. at 7) that section 401(d) authorizes states to impose conditions on certifications based on "any other appropriate requirements of State law," the states' conditioning authority attaches only to certifications "provided under this section."[16] Identifying which requirements are

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agency review of state certification" and that "the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification.").

[15] To the contrary, NYSDEC has made full use of opportunities to protect water quality, including, for example, participation in FERC's prefiling consultation process and license application proceedings. *See e.g., Niagara Mohawk Power Corp.*, 63 F.E.R.C. (CCH) ¶ 62,257 at 64,470 (1993).

[16] Section 401(d) provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring

"appropriate" as conditions imposed on section 401 certifications, therefore, depends on when such certifications are required.

Under section 401(a)(1), a state may deny certification only if a discharge from a federally licensed project will not comply with the applicable provisions of one of five listed sections of the CWA.[17] Four of the enumerated sections authorize the Administrator of EPA to promulgate restrictions on discharges of pollutants by point sources. *See supra* note 1. The remaining provision, section 303, authorizes the states to promulgate water quality standards which must be approved by EPA before they may take effect. *See supra* note 2 and accompanying text. In section 401(a)(1), Congress gave states the power to enforce only federally promulgated effluent restrictions or federally approved water quality standards.

In section 401(a)(1), Congress did not authorize states to veto federal licenses or permits based on state requirements that were not presented to EPA for approval. NYSDEC's reading of the "appropriate requirement" clause of section 401(d) to include all state laws remotely touching on water quality would eviscerate the circumscribed limits of state authority under section 401(a)(1).

> requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations or other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification. . . .

33 U.S.C. § 1341(d).

[17] Section 401(a)(1) requires an applicant for a Federal license or permit authorizing an activity that may result in a discharge into navigable waters, to provide a State certification "that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1).

Such a reading would enable state agencies to impose onerous conditions on certifications that would be tantamount to vetoing federal licenses or permits based on grounds that fall outside federally mandated effluent limitations and federally approved state water quality standards.

B. NYSDEC's Interpretation of Section 401 and Its Attacks on the Court of Appeals' Decision Are Unfounded.

NYSDEC argues, based on legislative history, that the inclusion of a reference to section 303 (the water quality standards provision) in subsection 401(a)(1) without a similar reference in subsection 401(d) must mean that the conditioning authority in the latter subsection is broader than the certification authority under the former. (Pet. at 8-9.) NYSDEC errs, however, in reading some purpose into the lack of an explicit reference to section 303 in subsection 401(d). When Congress amended subsection 401(a)(1) to include a reference to section 303 in 1977, the conference committee made clear that the omission of similar references in other sections, such as subsection 401(d), was not to have a substantive effect:

> It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306 and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act. . . . *Section 303 is always included by reference where section 301 is listed.*

H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471 (emphasis added). Subsection 401(d) therefore does include an implicit reference to section 303 by including an explicit reference to section 301.

NYSDEC also contends that the Court of Appeals decided matters that were unripe for decision. (Pet. at 18.) As noted *supra* at note 8, however, NYSDEC failed to seek review of the ripeness issue after the trial court initially found that the issues raised by Niagara Mohawk's request for a declaratory ruling were appropriately within the scope of New York's declaratory action procedures. The ripeness issue was not properly preserved for later review.[18] Because the issues of ripeness and its preservation for appellate review are intimately tied to state procedural law, these issues cannot form appropriate subjects of or bases for this Court's certiorari jurisdiction.[19]

Finally, NYSDEC attempts to rely on a letter from EPA to FERC and the deference to which EPA's views are entitled.[20] (Pet. at 17-18.) This letter—for whatever an agency's informal views are worth—does not address the issue raised in NYSDEC's declaratory ruling or the New York Court of Appeals' decision. The letter discusses only the permissible scope of a state's water quality standards; it does not address whether a state may look *beyond* its water quality standards in the section 401 process. Regardless of its bearing on the former point, the EPA letter provides no support for NYSDEC's petition.

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[18] *See Gramercy Equities Corp. v. Dumont*, 531 N.E.2d 629, 632 (N.Y. 1988); *People by Abrams v. Two Wheel Corp.*, 525 N.E.2d 692, 694 (N.Y. 1988). *See also Street v. New York*, 394 U.S. 576, 581-82 (1969) (finding that there was no jurisdiction to resolve an issue that was not presented to the New York Court of Appeals).

[19] *See Duncan v. Tennessee*, 405 U.S. 127, 127 (1972) (dismissing writ of certiorari because the issues were "so interrelated with [peculiar state criminal procedure rules] as not to warrant the exercise of the certiorari jurisdiction of this Court.").

[20] Letter from LaJuana S. Wilcher, Assistant Administrator of the EPA to Lois D. Cashell, Secretary of the FERC (Jan. 18, 1991).

C. The Court of Appeals Gave Due Consideration to Congress's Comprehensive Regulatory Scheme for Hydroelectric Projects.

By holding that NYSDEC has limited authority under section 401, the New York Court of Appeals properly recognized the comprehensive regulatory structure created by Congress and vested in the FERC. The FERC's broad authority over virtually every aspect of hydropower development, including environmental aspects, is apparent on the face of the FPA. Indeed, in 1986 (after the enactment and most recent amendment of section 401 of the CWA), Congress enacted the Electric Consumers Protection Act ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243 (1986), primarily to reaffirm the duty of the FERC to balance all aspects of hydroelectric projects in its licensing decisions.[21]

This Court has recognized that the FPA was intended to consolidate the regulation of hydropower projects under the control of a single federal agency to promote the de-

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[21] Section 4(e) of the FPA, as amended by the ECPA, requires the FERC to

> give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 797(e). Section 10(a)(1) requires FERC to condition a license so that the project

> will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses.

16 U.S.C. § 803(a)(1). Also, the ECPA added section 10(j) to the FPA to require the FERC to solicit the recommendations of all interested state and federal resource agencies regarding conditions to be included in a license. 16 U.S.C. § 803(j).

velopment of the hydroelectric potential of the Nation's water resources in a balanced manner. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 174 & 180 (1946) (noting that "Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power" and that the FPA "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so"). This Court also recognized that an integral part of this consolidated authority is the balancing of developmental and environmental concerns. *See Udall v. FPC*, 387 U.S. 428 (1967).

The comprehensive regulatory structure established by the FPA leaves only a limited role for states in the regulation of hydropower development. By enacting the ECPA to amend the FPA, Congress emphasized that it intended to preserve the FERC's discretion to accept or reject the recommendations of state and federal resource agencies concerning conditions designed to satisfy environmental and other concerns.[22] This Court recognized that:

> By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with *final authority* to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA *to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role.*

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[22] "The provision is intended to stress the expertise of these agencies and the need for FERC to rely on them. Section 10(j) does not give such agencies a veto, nor does it give them mandatory authority . . . ." H.R. Conf. Rep. No. 99-934, 99th Cong., 2d Sess. 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2540.

California, 495 U.S. at 499 (emphasis added). NYSDEC's suggestion that states have authority to duplicate or override the regulatory activities of the FERC is therefore unfounded.[23]

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[23] This Court has held that "[t]he detailed provisions of the [FPA] providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. Nor is there room for states to override the FERC's decisions about the balance of relevant developmental and environmental factors. *Id.* at 164 ("Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."); *see also Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) ("There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves.").

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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March 10, 1994

APPENDIX

APPENDIX

NYSDEC DECLARATORY RULING

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
Albany, New York 12233

[EMBLEM]

MARC S. GERSTMAN
Deputy Commissioner and General Counsel

August 27, 1990

Mr. Brian K. Billinson
Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202

RE: Petition for Declaratory Ruling: 15-09

Dear Mr. Billinson:

You have petitioned, on behalf of Niagara Mohawk Power Corporation (Niagara Mohawk), for a Declaratory Ruling pursuant to § 204 of the State Administrative Procedure Act and 6 NYCRR Part 619 regarding the applicability of Environmental Conservation Law (ECL) Article 15, Title 5 to Niagara Mohawk's federally licensed hydropower dam repair and reconstruction activities undertaken pursuant to an order of the Federal Energy Regulatory Commission (FERC).

The question of federal preemption, which raises issues of concurrent federal-state jurisdiction and Congress' intent to occupy the field of hydropower regulation, is not properly resolved through the issuance of a Declaratory Ruling. SAPA § 204; 6 NYCRR §§ 619.3(a) and (d). Moreover, it is not necessary to address the issue of fed-

eral preemption under the Federal Power Act since I find, for the reasons set forth below, that the substantive provisions of ECL Article 15, Title 5 are applicable to federally licensed hydropower facilities under authority granted by Congress to the State under § 401 of the Federal Clean Water Act (§ 401). 33 U.S.C. § 1341.

Section 401 of the Federal Clean Water Act (CWA) is an express congressional provision giving the states permit authority over federally licensed hydropower facilities to assure compliance with applicable water quality standards. 33 U.S.C. § 1341(a)(1). The scope of § 401 is best understood through examination of its precursor, § 21 of the Federal Water Pollution Control Act ("FWPCA"), enacted in 1970.

The FWPCA focused primarily on the quality of the waters receiving pollution, not on the source of pollution. The CWA, enacted in 1972, significantly shifted emphasis in pollution control strategy from water quality standards to effluent limitations. 1972 *U.S. Code Cong. & Adm. News* 7668, 7673. The CWA also expanded the scope of the certification authority granted to the states from water quality standards to include "other limitations, standards, regulations, or requirements, or water quality criteria".

This evolution of authority can be seen by comparing the following two sections of the FWPCA and the CWA:

> FWPCA 21(c):
>
> Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with applicable water quality *standards*. The Secretary shall, upon the request of any . . . State . . . provide, for the purpose of this section, any relevant information on applicable water quality *standards*, and shall, when requested by any such . . . State . . .

comment on any methods to comply with such *standards* (emphasis added).

CWA 401(b):

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality *requirements.* The Administrator shall, upon the request of any . . . State . . . provide, for the purpose of this section, any relevant information on applicable *effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria,* and shall, when requested by any such or . . . State . . . comment on any methods to comply with such *limitations, standards, regulations, requirements, or criteria* (emphasis added).

Further, the CWA added the following provision, clearly delineating the broadened scope of the states' authority:

CWA 401(d):

Any certification provided under this section shall set forth any effluent limitations *and other limitations,* and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations *and other limitations,* under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, *and with any other appropriate requirement of State law set forth in such certification,* and shall become a condition on any Federal license or permit subject to the provisions of this section (emphasis added).

It is notable that the House version of § 401(d), HR 11896, did not contain the "any other appropriate re-

quirement" provision. Public Law 92-500; Legislative History, Report 93-1 at p. 1052.

In analyzing the newly proposed § 401 the 1972 Senate Committee Report states:

> In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

1972 *U.S. Code Cong. & Ad. News* 3668, 3735.

Given the clear changes enacted in the 1972 CWA, it is evident that Congress intended the states' authority to extend beyond compliance with water quality standards. The requirements of state law which can be imposed by states in a 401 Certificate were explicitly broadened.

The extent of New York's authority under CWA § 401 has not yet been raised before the New York Courts[.] The only cases relevant to the issue either construed the provisions of the FWPCA, not the CWA, or are distinguishable on the facts.

In *De Rham v. Diamond*, 32 N.Y.2d 34, 44 (1973) the New York Court of Appeals explicitly recognized and adopted the precedent established in *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), finding that Congress had granted the Federal Power Commission [(FPC) now the Federal Energy Regulatory Commission (FERC)] broad powers to regulate hydroelectric facilities and that that jurisdiction preempted state licensing and permit functions. In *De Rham*, opponents to Consolidated Edison's proposal to build a pumped-storage facility on Storm King Mountain challenged the DEC's certification pursuant to FWPCA

§ 21(b) that the project would not violate applicable water quality standards. The court found that FWPCA § 21(b) relinquished only one element of jurisdiction to the State by authorizing the State to certify whether or not a project would contravene water quality standards. The court held that:

> Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

32 N.Y.2d at 44.

After reaching this conclusion, the court went on to determine that DEC did not have jurisdiction to examine other issues that had already been examined by the FPC.

In *Power Authority of the State of New York ("PASNY") v. Williams*, 94 A.D.2d 69 (Third Dept. 1983); *rev'd.* 60 N.Y. 2d 315 (1983), DEC denied a 401 certificate for the Prattsville pumped-storage project on the grounds that it would not meet the applicable water quality standards. The Power Authority argued that DEC should have broadened its review to encompass the State Energy Master Plan (SEMP) in rendering its decision. The Appellate Division agreed, holding that DEC must act in accord with the energy policy which requires weighing environmental impacts with the overall public interest. The New York Court of Appeals reversed, finding that DEC had not erred in not considering the SEMP and general environmental factors. The Court, citing *De Rham*, found the FPA preempts all state licensing and permit functions and that the Clean Water Act relinquished to the States only the narrow question of whether or not construction and operation of the project would violate applicable water quality standards. 60 N.Y.2d at 324-25.

In *Fourth Branch Associates, et ano. v. DEC*, —— Misc. 2d ——, 550 N.Y.S.2d 769 (S.Ct. Albany Co.

1989), Petitioners challenged the issuance of a 401 certificate for a hydropower project, arguing that DEC failed to adequately review the project under the provisions of the State's Environmental Quality Review Act (SEQRA) Environmental Conservation Law Article 8; 6 NYCRR Part 617. Petitioners' claims were dismissed by the court, which held that the FPA pre-empts DEC from conducting a full SEQRA review of the project in conjunction with the issuance of a 401 certificate, 550 N.Y.S.2d at 777. The court, citing *PASNY* and *De Rham*, also found that DEC's authority under the 401 certificate was limited to a consideration of the project's impacts on applicable water quality standards. 550 N.Y.S.2d at 773-74. In a related decision, *Fourth Branch Associates v. DEC*, Slip Op. 6029-89; 1989 WL 165837 (S. Ct. Albany Co. November 28, 1989)], the court, citing *Fourth Branch Associates* and *First Iowa*, held that DEC could not require proponents of a federally licensed hydropower project to obtain State-issued ECL Article 15 Permits. Slip Op. at 6.

In *De Rham* the court correctly limited the State to considering compliance with water quality standards as it was interpreting § 21 of the FWPCA, and not § 401 of the CWA. In *PASNY*, the court upheld the State's determination that water quality standards of the receiving waters would be violated by the operation of a pumped storage facility. As the 401 certificate was denied on this most basic threshold determination, the issue of whether or not other water quality requirements could be imposed was never reached by the court.

While the lower court's decision in *Fourth Branch* could be interpreted to limit the State's § 401 review to determining whether or not water quality standards will be maintained, the opinion did not analyze the differences between § 21 and § 401, but merely stated that § 401 supersedes § 21 "without substantial change". 550 N.Y.S.2d at 769. The comparative analysis set forth above and the legislative history of these sections leads to the con-

clusion that the decision incorrectly interpreted the scope of the State's authority under CWA § 401. The court in *Fourth Branch* did not revoke the 401 certificate in question. That certificate contains expansive conditions which go beyond assuring compliance with water quality standards. Thus, the *Fourth Branch* decision did not require nor has it caused the Department to limit the scope of the 401 certificates it issues and does not represent *stare decisis* for purposes of determining that scope.

Pursuant to the authority granted by Congress to require compliance with all water quality-related State statutes and regulations and "any appropriate requirement of State law" and to the authority conferred by State law, DEC has issued regulations governing use and protection of State waters. 6 NYCRR Part 608. In addition to DEC's explicit water quality standards, 6 NYCRR Parts 701 through 704, Part 608 makes several other regulatory programs applicable to applications for 401 Certification. Those regulatory requirements, as made applicable through 6 NYCRR 608.7(6) are:

(a) Protection of Waters: disturbance of stream beds [ECL § 15-0501];

(b) Protection of Waters: dam construction [ECL § 15-0503];

(c) Protection of Waters: excavation or fill [ECL § 15-0505];

(d) Dam Safety [ECL § 15-0507];

(e) Reservoir Releases [ECL § 15-0801 *et seq.*];

(f) Wild, Scenic and Recreational River System [ECL 15-2700, *et seq*];

(g) Freshwater Wetlands [ECL Article 24];

(h) Fish and Wildlife [ECL Article 11]; and

(i) Environmental Quality Review [ECL Article 8].

An analysis of each of the applicable regulatory requirements shows that they fall within the scope of water-quality related conditions authorized by CWA § 401. These requirements are intended to protect fish and aquatic resources, and other natural resources, against erosion, excessive turbidity, and temperature and flow changes. Further, SEQRA has been interpreted as giving DEC the authority to impose conditions on State permits that are not substantively related to the permit being issued but which are "designed to mitigate the adverse environmental impacts identified, so long as these measures are reasonable in scope and reasonably related to the adverse impacts identified in the EIS". *Town of Henrietta v. DEC*, 76 A.D.2d 215, 226-227 (4th Dept. 1990). Thus, in conducting a SEQRA review of a 401 Certification request for a hydropower project, DEC may seek to impose additional conditions, including water-quality related conditions, on the certificate.

In summary, Congress has given the states the ability to resolve all water-quality related issues pertaining to the development of hydropower projects, pursuant to Section 401 of the Clean Water Act. This includes incorporation of substantive standards, based in State law and related to water quality, into the State-issued 401 Certificate. I have therefore determined that the substantive provisions of ECL Article 15 Title 5 are applicable to federally licensed hydropower facilities pursuant to § 401 of the Clean Water Act.

Commissioner Jorling recently issued an Organization and Delegation Memorandum #907-24 addressing the Department's hydropower review process. I am enclosing a copy to provide you with further guidance.

Very truly yours,

/s/
MARC S. GERSTMAN
Deputy Commissioner and
General Counsel

Enclosure